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In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF IDAHO, EX REL. DIRECTOR,
IDAHO DEPARTMENT OF WATER RESOURCES

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

The Idaho Supreme Court has ruled that the United States shall not be allowed to defend its water rights in a general stream adjudication unless the United States pays "filing fees," totalling more than $10 million, to finance the State's costs in the adjudication. This Court should review that erroneous decision because it presents a direct clash between the United States and an individual State concerning the scope of the federal government's sovereign immunity, will impair administration of federal programs, and will confound water rights litigation throughout the western States. Idaho's response to our petition reinforces our submission. The State's arguments are utterly at odds with this Court's decisions and the plain language of the relevant laws, and they highlight the confusion that the decision will create.

1. Idaho errs at the outset in its characterization of the proceedings in this suit. The State portrays its Director of the Department of Water Resources as a "fact finder for the court" whose role "is to facilitate the adjudication by providing assistance to claimants in the filing of their claims, by reviewing the claims and by preparing a report on all claims." Br. in Opp. 6 n.6, 7. The Idaho statute expressly states, however, that the Director is a *party* to the suit. Idaho Code § 42-1401A(7) (1990).[1] Indeed, the Director initiated this adjudication, joining the United States as a defendant pursuant to the McCarran Amendment (43 U.S.C. 666). Pet. App. 5a; see Idaho Code §§ 42-1406, 42-1406A (1990). If the Director disagrees with the United States' water rights claims, he may contest them, and if unsuccessful, he may appeal the district court's judgment. Idaho Code §§ 42-1412, 42-1418 (1990). Thus, the Director is not acting as a disinterested factfinder or stakeholder, but rather as a litigant who has sued the United States pursuant to the McCarran Amendment and who has interests adverse to those of the United States and the Indian Tribes the federal government represents. See Amici Br. for the Nez Perce Tribe *et al.*[2]

Idaho portrays the United States as a beneficiary of the Director's suit. Br. in Opp. 6-7, 10, 22. As Justice Johnson

[1] The state statute instructs the Director to collect the United States' claims and file a report describing them, Idaho Code §§ 42-1409 to 42-1411 (1990), but the claims, the Director's report, any objections, and the Director's responses thereto are expressly denominated as "pleadings." Idaho Code § 42-1412(4) (1990). Thus, the recommendations to be contained in the Director's report will be titled "proposed findings of fact." Tr. 611.

[2] The Idaho Code separately provides for the appointment of a special master to assist the court "to determine the water right claims asserted in the general adjudication." Idaho Code 42-1422 (1990). The Idaho Supreme Court has specifically ruled that the Director cannot act as a special master in light of his participation as a party in the litigation. See *Avondale Irrigation Dist.* v. *North Idaho Properties, Inc.*, 523 P.2d 818, 822 (1974). Cf. *United States* v. *Superior Court*, 697 P.2d 658, 671-674 (Ariz. 1985) (state water resource agency does not act as "an adjudicator of law or fact" in a general stream adjudication).

noted, however, the true beneficiaries are Idaho and the Idaho Power Company (who arranged for this litigation in the course of settling their prior lawsuit), not the United States and the thousands of other defendants who must participate in the adjudication to retain their water rights. See Pet. 6.[3] Idaho also speaks glowingly of the "special services" the Director provides, Br. in Opp. 7 & n.7, 10 n.10, 22. But the services described in the Idaho Code—such as serving process and collecting claims, *id.* at 22—are simply obligations that ought to be assumed by the Director as the initiator of this lawsuit. Other services the Director purports to provide to Idaho citizens—such as assistance in drafting claims, *id.* at 7 & n.7, 22—are not specifically included as a statutory responsibility, see Tr. 1178-1179, and are neither requested by nor of any benefit to the United States.[4] Indeed, as we explained in our petition, the Director will actually employ the filing fees paid by the United States to fund, among other things, challenges to the United States' water right claims. See Pet. 7-8.[5]

[3] As Justice Johnson stated, "The long and short of it is that the Idaho Power Company and the State of Idaho set the SRBA [Snake River Basin Adjudication] in motion. The United States is just along for the ride, pursuant to the McCarran Amendment." Pet. App. 28a (Johnson, J., dissenting).

[4] Idaho indicates that it "makes extensive information available to claimants, including specially prepared hydrologic studies, computer modelling and orthophotoquad maps." Br. in Opp. 7. In fact, state-prepared hydrologic studies and computer modelling are available only at *additional* cost to a claimant. See Tr. 1184-1185.

[5] Idaho incorrectly states that "[t]he filing fees in the SRBA are not used to pay adversarial 'litigation' costs of the State." Br. in Opp. 10. The filing fees are used to pay attorney and other costs incurred by the Director in the adjudication, including costs for service of process, investigation of matters to be included in the Director's Report, preparation of the report, defense of the report, conduct of discovery, preparation of legal exhibits, drafting of pleadings, preparation of expert witnesses for trial, appearance of witnesses at trial, and numerous other activities by the Director and his staff. See Pet. 7-8. Indeed, the State has projected $2.1 million in attorney salary costs chargeable to the adjudication account. See Tr. 417, 545-546.

2. However Idaho chooses to characterize the Director's role in this litigation, it is clear that Idaho may not lawfully assess filing fees against the United States unless it can demonstrate that Congress has unambiguously waived the United States' sovereign immunity from those assessments. See, *e.g.*, *United States Dep't of Energy* v. *Ohio*, 112 S. Ct. 1627, 1633 (1992). The McCarran Amendment contains no such waiver. As we explained in our petition, the Amendment has three central features:

> (1) it allows joinder of the United States as a defendant in water rights adjudications if it appears that the United States is the owner of or is in the process of acquiring water rights "by appropriation under State law, by purchase, by exchange, or otherwise";
>
> (2) it deems the United States "to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty"; and
>
> (3) it subjects the United States to judgments and orders of the court having jurisdiction, except that "no judgment for costs shall be entered against the United States in any such suit."

43 U.S.C. 666(a). See Pet. 4-5, 12. The McCarran Amendment contains no express waiver of the United States' immunity from filing fees.

Idaho concedes that it must demonstrate that the McCarran Amendment unambiguously waives the United States' sovereign immunity from fee assessments. Br. in Opp. 12-13. The State additionally concedes that the first

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Significantly, Idaho itself highlights the "skewed" nature of its fee assessments. Br. in Opp. 9 n.8. The State notes that the largest *number* of the United States' water right claims are for domestic and stock watering uses, which are not subject to a variable fee. But the bulk of the total fee *amount* charged against the United States consists of variable fees assessed against federal reserved water right claims. See Pet. 8.

provision of the Amendment, which grants the United States' consent to *suit*, does not suffice as a waiver of immunity to fees. *Id.* at 15.[6] Idaho contends instead that the second provision, which waives the United States' right to plead that "the State laws" are inapplicable, "contains the critical waiver of sovereign immunity." *Id.* at 15-16. In Idaho's view, "the State laws" must refer to filing fee requirements, because a more restrictive interpretation "would unduly restrict the Amendment." *Id.* at 18. But as we explained in our petition (at 16-17), that phrase has a clearly discernible—and quite different—meaning.

As Idaho acknowledges, Congress's use of the definite article "the" before "State laws" indicates that "the term 'state laws' refers to a particular set of laws." Br. in Opp. 19. Congress clearly identified in the preceding sentence the particular body of "State law" to which it was referring. That sentence subjects the United States to suit where it appears that the United States is the owner of or is in the process of acquiring water rights "by appropriation under State law." 43 U.S.C. 666(a). There is no reason to doubt that the body of state law referred to in the first and second sentences is one and the same: the state laws governing "acqui[sition of] water rights by appropriation." 43 U.S.C. 666(a). The first sentence subjects the United States to joinder as a defendant if (among other things) its appears that the United States has acquired or is acquiring water rights by appropriation under state law. The second sentence prevents the United States from pleading sovereign immunity to excuse its failure to follow state-law requirements for acquiring those rights. But neither sentence prevents the United

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[6] Idaho states that "Congress realized that merely consenting to joinder of the United States in an adjudication 'suit' did not go far enough. • • • Further consent was needed from Congress, beyond simply joining the United States in such suits, to require the United States to comply with these special adjudication requirements." Br. in Opp. 15.

States from asserting immunity from other state-law provisions, includ-ing statutes assessing fees and costs in litigating those rights. See Pet. 16-17.

Contrary to Idaho's assertion, that interpretation does not "violate[] common sense rules of construction." Br. in Opp. 19. As this Court has explained, "[s]tatutory construction * * * is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear." *United Sav. Ass'n* v. *Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 (1988). In this instance, it is sensible to consider the McCarran Amendment's prior reference to "State law" in determining what Congress meant when it later used the term "the State laws." By contrast, Idaho's assertion that the term refers to "adjudication laws" (Br. in Opp. 19) finds no similar support in the statute. Indeed, Idaho does not explain from whence it derived that construction.[7]

Idaho also contends that our interpretation "fails to make sense." Br. in Opp. 19 n.15. To the contrary, our interpretation makes perfect sense, especially when the interpretation is viewed in context. The first sentence of the McCarran Amendment gives Congress's consent "to join the United States as a defendant" in a general stream adjudication. 43 U.S.C. 666(a). But that sentence does not

[7] There is no merit to Idaho's contention that "[t]he United States is only rearguing issues previously rejected by the Court." Br. in Opp. 16; see also *id.* at 18, 19. No prior decision of this Court has held, or even remotely suggested, that the McCarran Amendment constitutes a waiver of federal sovereign immunity from filing fees. Idaho's contention that this Court has "consistently characterized the waiver in the McCarran Amendment as 'all-inclusive,'" Br. in Opp. 18, mischaracterizes this Court's McCarran Amendment decisions. The cases Idaho cites, *United States* v. *District Court for Eagle County*, 401 U.S. 520, 523 (1971), and *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 810 (1976), construed the first sentence of the McCarran Amendment as "all-inclusive" with respect to the water right claims that may be adjudicated on the merits. They did not concern filing fees.

prevent the United States from asserting that it is immune from various substantive requirements—such as notice, filing, or beneficial use requirements—that a State imposes on citizens who acquire water rights through state doctrines of prior appropriation. It is the second sentence of the McCarran Amendment, which precludes the United States from pleading that "the State laws are inapplicable," 43 U.S.C. 666(a), that prevents the United States from asserting sovereign immunity as an excuse for failing to comply with those substantive requirements. That sentence does not, however, waive the United States' immunity from other state laws—especially the United States' distinct immunity from fees and costs.[8]

The McCarran Amendment plainly does not contain an unequivocal waiver of sovereign immunity from filing fees. See, *e.g.*, *United States Dep't of Energy*, 112 S. Ct. at 1633. This is particularly clear in light of this Court's requirement that Congress provide a "separate waiver" to eliminate the United States' immunity for matters ancillary to the merits of a lawsuit, such as attorney's fees, interest, and costs. See *Library of Congress* v. *Shaw*, 478 U.S. 310, 314-315 (1986). See Pet. 14-15, 17. The filing fees at issue here, which are assessed "for financing the costs of adjudicating water rights," Idaho Code § 42-1414 (1990), clearly require a separate waiver, regardless of whether Idaho chooses to describe them as "fees" or "costs" (Br. in Opp. 20-21). See *Library of Congress*, 478 U.S. at 321 (sovereign immunity may not be avoided "by devising a new name for an old institution"). Far from

[8] Our interpretation also explains why the McCarran Amendment does not waive the United States' immunity from state laws that purport to restrict federal reserved water rights. The McCarran Amendment waives the United States' immunity only with respect to "the State laws" governing acquisition of "water rights by appropriation." 43 U.S.C. 666(a).

providing a "separate waiver," the McCarran Amendment specifically states that "no judgment for costs shall be entered against the United States." 43 U.S.C. 666.[9] No reason exists for believing that Congress intended that a State could recover its costs indirectly, merely by assessing "filing fees." See Pet. 17-18.[10]

3. Respondent disputes our showing (Pet. 19-20) that this case merits the Court's review, asserting that "during the forty years since the enactment of the McCarran Amendment the United States has consistently paid filing fees in adjudications around the West," and that the "only reason for this appeal is the size and nature of the present adjudication." Br. in Opp. 12; see *id.* at 25-26. Contrary to Idaho's assertions, the United States has consistently opposed the assessment of filing fees in general stream adjudications. See, *e.g.*, *United States* v. *Oregon Water Resources Dep't*, 774 F. Supp. 1568, 1580-1581 (D. Or. 1991); *United States* v. *City & County of Denver*, 656 P.2d 1, 15 (Colo. 1982). In light of "the generally applicable principle *de minimis non curat lex*," *Republic of Argentina* v. *Weltover, Inc.*, 112 S. Ct. 2160, 2168 (1992), the United States has frequently paid the fees

[9] Idaho's filing fees are the functional equivalent of a judgment for costs in a general stream adjudication, because the filing fees accomplish the same cost-shifting result for the State that was previously accomplished in Idaho by a judgment for costs. The filing fee requirement simply moves the timing of that cost-shifting forward to the start of the litigation. See Pet. 17-18; see also note 5, *supra*.

[10] Idaho insists that "several states in 1952 provided for graduated filing fees analogous to the fees contested in this case" (Br. in Opp. 21 n.16), citing the Nevada, Arizona, and Oregon statutes. Even if correct, that would not mean that Congress waived the United States' immunity from filing fees in the McCarran Amendment, because the Amendment contains no clear and unambiguous waiver of federal sovereign immunity from filing fees. In any event, no State assessed comparable fees in judicial water rights proceedings—the only type of proceeding to which the McCarran Amendment applies. See Pet. 18 n.10. Nevada, Oregon, and Arizona, required payment of filing fees in water rights adjudications initiated by administrative proceedings. See *ibid.*

under protest, declining to seek judicial review of de minimis assessments.[11] The fees assessed in this case, which will total more than $10 million, are far from de minimis, and they therefore provide the appropriate case for this Court's review.[12]

Idaho also asserts that "the issues raised by the United States regarding filing fees are unlikely to arise in future cases." Br. in Opp. 26. But as Idaho itself has acknowledged, States have frequently attempted to assess filing fees against the United States. Br. in Opp. 23-24. And as Justice Boyle explained below, the Idaho Supreme Court's decision will invite other States to impose similarly rapacious filing fees against the United States. See Pet. App. 40a (Boyle, J. dissenting). The state assessments will deplete federal agency funds by diverting them from federal to state agencies. Unless this Court acts, the issue will become a recurring source of conflict between the federal government and the western States.[13]

[11] For example, in the *City & County of Denver* litigation, the United States paid $3,728 in fees under protest and did not seek review of the assessment in the Colorado Supreme Court. See *City & County of Denver*, 656 P.2d at 15, 20 n.33.

[12] It is not surprising, given the importance of federal supremacy, that this Court has consistently reviewed state attempts to infringe on federal sovereignty, with little regard for the "size" or "nature" of the state impositions at issue. See, *e.g.*, *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187 (1956) (state licensing of contractors on federal projects); *Mayo* v. *United States*, 319 U.S. 441 (1943) (state assessment of fertilizer inspection fee); *Ohio* v. *Thomas*, 173 U.S. 276 (1899) (state prohibition on using margarine in a federal soldiers' home). The United States should not be penalized for showing restraint and declining to seek this Court's review until state action seriously impairs federal and Indian interests. See also *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983).

[13] Although Idaho tries to persuade this Court that the filing fee issue is not important, the State has taken a dramatically different position below. Since Idaho filed its brief in opposition in this Court, the Director has written to the United States' trial counsel, stating that "[t]he importance of the filing fee issue cannot be underestimated" and emphasizing the "gravity of this matter" with respect to the State's conduct of water rights adjudications. See Addendum, *infra*. We have

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

OCTOBER 1992

no reason to doubt that other western States will be equally insistent that the United States fund their water rights adjudications.

ADDENDUM

STATE OF IDAHO
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October 2, 1992

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RE: Federal Claims for Test Reporting Areas

Dear Peter and Jack:

I have filed the United States' water right claims for Reporting Areas 34, 2, and 3 as ordered by the Fifth Judicial District Court to facilitate progress toward completion of the SRBA. My acceptance of

the claims should in no way be construed, however, as a waiver of my legal duty to accept claims for filing only upon payment of filing fees. Indeed, assuming that the Idaho Supreme Court decision requiring payment of filing fees by the United States is not altered by the United States Supreme Court, I fully expect the United States will immediately pay filing fees for the claims reported in the test reporting areas. A final decree of these claims is contingent upon the fees being paid.

The importance of the filing fee issue cannot be underestimated. The Snake River Basin Adjudication is premised upon each claimant, including the United States, paying an equitable share of the expenses of the adjudication. If the United States successfully avoids paying for its fair share of the services provided by IDWR to all claimants, then, in my opinion, the United States should not enjoy the benefits of the adjudication. Indeed, I intend to seek legislation excluding the United States form [*sic*] the Snake River Basin Adjudication if the United States does not pay fees.

While I recognize that the United States does not agree that the McCarran Amendment waives its sovereign immunity to payment of adjudication filing fees, I believe it is important that you understand the gravity of this matter. The Idaho Department of Water Resources is not in a position to assume the financial burden of [*sic*] the state of Idaho of accepting and processing federal claims absent the payment of filing fees.

Sincerely,
/s/ R. Keith Higginson
R. KEITH HIGGINSON
Director

cc: Clive Strong
David B. Shaw